NO. 2016

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMERY VALENTINE,
Plaintiff in Error.

vs.

J. J. McGRATH and S. HIRSCH,
Defendants in Error

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

BRIEF OF PLAINTIFF IN ERROR

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STATEMENT OF THE CASE

This was an action in ejectment, brought by the plaintiff in Error to recover three separate portions of land in the Town of Juneau, Alaska.

The Court will obtain a clearer idea of the property in controversy by a glance at the plat on page 73 of the record, than by a description. The parcels sued for are colored in red on the said plat.

Plaintiff alleged ownership in fee simple, and prayed for restitution, and rental value as damages. (Rec. 3-7.)

Defendant Hirsch answered denying the allegations of the complaint for want of knowledge, and affirmatively plead a lease from his co-defendant. (Rec. 8-10.)

Defendant McGrath answered, denying the allegations of the complaint, a plea of the statue of limitation of seven and ten years, and filed a cross complaint alleging in substance that plaintiff had obtained the title to the ground in controversy from the Townsite Trustee fraudulently and prayed that he be charged as trustee for the defendant. The deeds from the Townsite Trustee to plaintiff were attached to the cross-complaint as exhibits. (Rec. 11-56). This answer and cross-complaint were filed January 5th, 1910.

Plaintiff replied denying the affirmative answer, and the allegations of fraud in the cross-complaint.

In as much as the findings and decree of the Court were adverse to the defendant in his affirmatice defences and cross-complaint and defendant has acquiesced therein a fuller statement thereof is deemed unnecessary.

The case was by stipulation tried to the Court. (Rec. 64.)

At the hearing all errors in description in the pleadings were waived and considered as amended to conform to the proofs. (2 finding Page 65.)

The Court made the following findings of fact and conclusions of law:

"This cause came on regularly for trial, and thereupon came the plaintiff by his attorney, J. H. Cobb, and the defendants by their attorney, John Rustgard, and all parties announced ready for trial; and all parties in open court waived a jury and agreed to submit all issues of fact as well as of law to the Court. And the Court, having heard the evidence and argument of counsel thereon, makes the following Findings of Fact:

1. The ground in controversy in this action is a part of the Town of Juneau, Alaska, which was entered for patent under the townsite laws upon October 13, 1893; the ground in controversy being portions of Lots 1, 2, and 3 in Block 3, and a portion of Lot 1 of Block G, in said town.

2. On the hearing it was expressly stipulated in open Court by counsel for both sides that any errors

in description in the pleadings should be considered as amended to conform to the proof, and the case was heard and tried fully upon the merits.

3. Plaintiff in 1897, shortly after the issuance of patent and after the proper posting and publication of notice by the townsite trustee that his office was ready to proceed to the issuance of deeds under the townsite laws, made his [56] application for deeds to all of Lots 1, 2 and 3 in Block 3, according to the official survey of said town, and to the following described portion of Lot 1, in Block G, to wit: "Beginning at a point on the common boundary line between Lot No. 1 in Block No. 3, and Block G, about 2 feet distant Westerly from the southeast corner of said Lot No. 1; thence southerly 33.7 feet to a point on the south boundary line of said Block G 51.8 feet easterly from the west corner of said Block G; thence westerly along the south boundary line of said Block; thence along the common boundary line Lot No. 1, in Block No. 3, and Block G, to the point of beginning.

4. On the 3rd day of January, 1898, and before the issuance of any deed to the plaintiff, the defendant J. J. McGrath, made his application before the townsite trustee for a deed to a piece of ground described as follows, to wit: "That certain piece or parcel of land situate, lying and being between Lots 2 and 3, in Block 3, as per Hannan's plot, said piece or parcel of land fronting on the waterfront of said Town of Juneau and being 60 feet in width on said water-

front street and extending back a distance of 100 feet and being 24 feet in width on or at the rear end or line of said described piece or parcel of land."

5. The above and foregoing description in an imperfect description and is incapable of identification on the ground, and the townsite trustee, proceeding regularly upon the application of the plaintiff, thereafter on or about the 14th day of July, 1898, issued a deed to plaintiff, conveying to him all of Lot 1, in Block 3, and all of Lot 3, in Block 3, and the defendant never filed any contest against the application of the plaintiff for said Lots 1 and 3, in Block 3. [57]

6. The defendant, McGrath's application, as above made, was contested by the plaintiff, Valentine,, before the townsite trustee and the contest was heard upon the plaintiff's application for the premises in Block G, described above, and his application for Lot 2, in Block 3, and the defendant, McGrath's application for the premises attempted to be described in his application and on December 9, 1898, the defendant was required by the trustee to file, and did file, and amended application, which is set out in the defentdant, McGrath's, cross-complaint. Said contest was regularly heard and voluminous evidence introduced and, after a full hearing, the plaintiff, Valentine, was awarded the following described portion of Lot 2, in Block 3, to wit: "Commencing at a point at a point on the dividing line between Lots One (1) and Two (2), in Block

Three (3) 3.6 feet measured on said line from Block G; thence running in a northwesterly direction on said line a distance of 96.6 feet to the dividing line between Lots One (1) and Two (2) and Seven (7) and Eight (8), in said Block Three (3); thence in an easterly direction on said dividing line a distance of 50 feet to the east corner of said Lot Two (2), in Block Three (3); thence in a westerly direction on the dividing line between Lots Two (2) and Three (3), a distance of 12.6 feet; thence south 60 degrees 52 minutes 18.1 feet, thence south 29 degrees 8 minutes east 30.3 feet; thence south 17 degrees 55 minutes west to place of beginning, according to the official survey and plat of said Juneau, Alaska, as executed by G. W. Garside and approved by the trustee o fthe townsite of Juneau." Said trustee made his deed to Valentine for said premises on the 18th day of July, 1901, and on the 18th day of July, 1901, he executed to Emery Valentine his **[58]** deed for the following described portion of Lot 1, in Block G, to wit:

Beginning at the southwest corner of Lot One (1) in Block Three (3); thence in a southeasterly direction on the Northerly line of Front Street a distance of 51.8 feet; thence north 17 degrees 55 minutes west to the dividing line between said Block Three (3) and Block G. Thence in a southwesterly direction on the dividing line between said Block Three (3) and Block G to the place of beginning. The defend-

ant, McGrath, was awarded all the remaining portion of Lot No. 2, in Block 3, and a portion of Lot 1, in Block G, not in controversy in this suit. The plaintiff, Valentine, appealed from said decision of the townsite trustee, but the decision o fthe trustee was affirmed on appeal by the Secretary of the Interior.

7. The property in controversy in this suit is more particularly shown upon the plat hereto attached and made a part hereof, and being the portions colored in red on said plat except that portion so colored in Block "G"; and said premises are described by field-notes as follows:

First: A portion of Lot One (1) in Block No. Three (3).

Beginning at the Southeasterly corner of said Lot No. One (1) at the Southwesterly corner of Lot No. Two (2) in Block No. Three (3); Thence N. 44 degrees W. on the dividing line between said Lots One and Two in Block Three a distance of 3.3 feet; thence Southerly 3.3 feet to a point on the south boundary line of said Lot One in Block Three, 1.5 distant from the Southeast corner of same, identical point of beginning; thence along the southerly boundary line of said Lot One in Block Three to the place of beginning.

Second: A portion of Lot N. Two (2) in Block No. Three (3), and a portion of Lot No. Three (3) in Block No. Three (3).

Beginning at a point on the common boundary line between said Lots Nos. 2 and 3 Block 3, 11.1 distant from the NE. corner of Lot 2, and the NW. corner of Lot 3; Thence N. 59 degrees 9 minutes E. 10 feet more or less to the corner of the building occupied by the defendants; thence S. 30 degrees 31 minutes E. 24.2 feet to the SE. corner of said building; thence S. 59 degrees 9 minutes W. 2.4 feet more or less to the intersection of the common boundary line between said Lots 2 and 3 in Block 3; **[59]**

Thence N. 44 degrees W. along said line 23.3 feet to apoint on said line 12.6 feet distant from the NE. corner said Lot 3 in Block 3;

Thence S. 60 degrees 52 minutes W. 18.1 feet; thence S. 29 degrees 8 minutes E. 30.3 feet;

Thence No. 30 degrees 51 minutes W. 24.2 feet to the corner of the building occupied by the defendants; thence N. 59 degrees 9 minutes E. along the north line of said building to the place of Beginning.

Third: A portion of Lot No. Three (3) in Block No. Three (3).

Beginning at a point on the common boundary line between Lots 2 and 3 in Block No. 3 29.6 feet distant from the SW. corner of said Lot 3, and the SE. corner of said Lot 2; thence N. 70 degrees 6 minutes E. 3.8 feet; thence N. 16 degrees 54 minutes W. 3.3 feet; thence S. 70 degrees 6 minutes E. 3.8 feet; thence N. 19 degrees 54 minutes W. 3.3 feet; thence S. 70 degrees 6 minutes W. 5.2 feet to the in-

tersection of said line between said Lots 2 and 3; thence S. 44 degrees E. along said line to the place of Beginning.

8. The failure of the defendant, McGrath, to file a contest over the application of the plaintiff for deeds to Lots 1 and 3, In Block 3, was due to no act or omission on the part of the plaintiff but appears to have been due solely to the negligence of the defendant, McGrath.

9. The contest between McGrath and the plaintiff, Valentine, over Lot 2, in Block 3, was fairly and fully heard, and there is no evidence of a mistake on part of the trustee in the conclusions arrived at.

10. The Court further finds that there is a two-story building costing about Four Thousand Dollars ($4,000.00) standing upon the defendant's ground, and which encroaches upon and covers that portion of Lot 1, in Block One (1) in controversy herein; that at the time of the erection of the building no notice was given by the owner of this small encrachment but the building was permitted to be completed without objection. Under these circumstances the Court finds it inequitable to award this ground to the plaintiff and allow him to chop a hole in the side of a valuable building, and materially damage and disfigure it, but plaintiff is entitled to recover the value of this piece of ground, and upon the payment of such value by the defendant he is entitled to an injunction against plaintiff, or [60] a conveyance.

11. The rental value of that portion of the ground awarded plaintiff is Ten Dollar ($10.) for the entire time it has been withheld by the defendant.

12. The defendant, S. Hirsch, is a tenant of McGrath and holding under him, and has no other interest in the premises.

From the above and foregoing facts, I conclude as matter of law—

1. That plaintiff is the legal and equitable owner of the premises in controversy, holding the same under patent from the United States to the townsite trustee and deeds from the townsite trustee to himself, and is entitled to recover the same with nominal rental thereof, to wit $10.00.

2. The defendant, McGrath, is concluded by the award of the townsite trustee from any claim in the premises in controversy.

3. The plaintiff is holding from and under the United States and the seven years statute of limitations plead by the defendant is not applicable, since it would in effect be to plead the same against the United States. I further conclude that the defendant, McGrath, is not holding the premises in controversy under any color of title.

4. The ten years statute of limitations plead by the defendant, McGrath, did not run at the time of the beginning of this action since the statute did not begin to run against the plaintiff until he received his deeds. The plaintiff is entitled to judgment

against both defendants for restitution of the premises in controversy, excepting that portion of Lot One (1) in Block One (1), and against McGrath for the rental value thereof, amounting now [61] to the sum of Ten Dollars ($10.00); and a judgment that the defendant ,McGrath, take nothing by his cross-complaints.

5. It is further ordered that the plaintiff be and he is hereby enjoined from entering upon that portion of Lot One (1) in Block One (1) described in the first cause of action and in these findings, but will be allowed sixty (60) days within which to institute a suit for its value and damages, if any, to the remainder of the tract, which issue may be proved in this suit, and jurisdiction retained for that purpose, or an independent suit instituted by plff.' as plaintiff may elect, and the injunction to remain in effect until sixty (6) days after the return unsatisfied of an execution upon any money judgment that may be recovered and the further order of the Court.

6. Each party will pay their own costs herein.

Let a judgment enter accordingly.

Dated, June 16th, 1910.

EDWARD E. CUSHMAN,

Judge.

(The plat referrel to is found on page 73 of the record.)

A judgment following these findings and conclusions was entered. (Rec. 75-77.)

From this judgment the plaintiff sued out a writ of error to this Court, assigned errors and now presents the case here for correction and review.

FIRST ASSIGNMENT OF ERROR

"The Court erred in not awarding to the plaintiff Emery Valentine, that portion of Lot No. 1, in Block G, of the town of Juneau, described in the third cause of action in the complaint, and in the second amended answer of the defendantMcGrath," (Rec. 90.)

The Court found that this property was in controversy. (1st finding, record page 64). This finding was modified by excepting that portion of the property, in the 7th finding. (Rec. 68.)

The Court gave the following reason for this action:

"Upon the motion of the plaintiff for judgment on the pleadings judgment was entered in this Court in 1908 decreeing that plaintiff recover from the defendant possession of the southeast corner of Lot 1, Block 3, being a triangular piece of ground 3 1-3 feet by 3 1-3 feet by 1½ feet, and two parecels of ground in Lot 3, Block 3, awarding the plaintiff damages for the detention of said property in the sum of One Thousand One Hundred and Twenty-Eight Dollars ($1128), said judgment upon motion of plaintiff to dismiss the third cause of action as affecting the land in Lot 1 in Block G it was so adjudicated. Upon writ of error to the Court of Appeals sued out

by the defendant said cause was reversed and remanded on account of the judgment being given for the amount of damages prayed in the complaint over the general denial in the defendant's answer. (167 Federal 473.)

"Upon the coming down of the mandate to this Court the defendant McGrath interposed a farther amended answer, which in addition to general denials of the allegations of the plaintiff's complaint pleads to each of said causes of action the defense of seven years actual, uninterrupted, exclusive, adverse, open, notorious, continual and hostile possession and occupany of the premises in controversy immediately prior to the commencement of the action, under color and claim of title." (Rec. 95-96.)

And further along the Court held:

"Regarding the land described in the third cause o faction in the complaint, as this cause of action was dismissed on plaintiff's own motion upon the first trial, I hold that the matter is now closed, and there will be no further judgment concerning it." (Rec. 95-96.)

And the Court refused to give plaintiff a judgment on the 3rd cause of action. This we think manifest error.

When the former judgment rendered in 1908 was set aside the judgment of non-suit was likewise set aside, as it formed a part of it.

Not only so, but plaintiff and defendants so regarded it. The plaintiff McGrath amended his answer and not only joined issue as to the third cause of action (Rec. 13-14) but filed a cross-complaint to it asking that the plaintiff be charged as his trustee (See 4th paragraph to answer and cross-complaint, Rec. 42-43.)

Both parties proceeded upon the theory that the premises in question were still in controversy and both sides presented evidence in full upon their respective titles. The Court heard the controversy without objection and actually determined the invalidity of the defendant's claim. Not only so, but the Court further determined the validity of the plaintiff's title. Why then refuse plaintiff judgment? Simply because at one time there had been a non-suit taken as to this portion of the disputed premises, which non-suit this court set aside; and that setting aside was acquiesced in as final by the defendant, McGrath, and thereafter he plead to that cause of action, and sought affirmative relief as to the premises.

SECOND ASSIGNMENT OF ERROR

"The Court erred in not awarding to the plaintiff, Emery Valentine, that portion of Lot No. 1 in Block No. 3 of the town of Juneau, described in the 1st cause of action in the complaint; and further erred in awarding the same to the defendant, McGrath, conditioned upon his paying any judgment that

might be recovered against him for the value of said premises, together with damages for with-holding the same in any suit that said Emery Valentine might bring within sixty days against the said McGrath." (Rec. 90.)

A judgment must follow and be supported by the pleadings. A Court has no power to adjudicate matters outside the issues made by the pleadings.

Black on Judg. Vol. 1, Sec. 183.

Kelley vs. Burton, 199 Fed. 466.

J. P. Jorgenson Co. vs. Rapp, 157 Fed. 732.

Lesaius vs. Goodman 165 Fed. 889.

Wagner Nat. Bk. vs. Welch, 164 Fed. 813.

And the rule is the same in equity.

Stanwood vs. Des Moines Sav. Bk., 178, Fed. 670.

The reason for that part of the judgment herein complained of, is stated by the Court in its written opinion as follows:

"It appears by the evidence that the time the the defendant erected the two-story frame building upon his land, which is proven to have cost upwards of $4,000.00 that the foundation was laid to include this corner of land and the matter was called to the attention of the agents of the owner and the question then considered of notifying the defendant and preventing his building the same so far to the westward as to include this ground, but no such steps were taken, and the plaintiff's predecessor in interest permitted the building to be completed without so

doing. Under these circumstances it appears inequitable to award this ground to the plaintiff and allow him to chop a hole i nthe side of a valuable building and very materially damage and disfigure it. In fact it would not appear to be any abuse of discretion to ignire the encroachment upon this small fraction of ground under the maxim de minimis non curat lex." (Rec. 103-104.)

In other words the Court in effect found that plaintiff was estopped by the conduct of his predecessor in interest from claiming this particular ground. But no such issue was made by the pleadings. No where is it claimed that plaintiff or his predecessors in interest mislead the defendant by silence or otherwise as to the extent of their claim, so as to have induced the defendant to build his house on their ground. On the other hand the pleadings show that defendant was claiming said ground under deeds conflicting with the plaintiff's title; that this conflict was heard and settled adversely to the defendant by the townsite trustee; and the only relief sought was to charge the plaintiff as trustees for the defendant by overturning the decision of the trustee, to have the plaintiff make a convenyance, and to correct the trustee's deeds.

Besides this the Court does not find that the defendant McGrath was mislead by the failure to object on the part of the plaintiff's predecessor in nterest, or relied thereon.

"Another essential element of estoppel by misrepresentation or concealment is that one party should have relied upon the conduct of the other and been induced by it to act or to refrain from acting so that he will be substantially injured of the other party should be allowed to repudiate his action. And this rule applies as well where the conduct of the party to be estopped consists of silence as where it consists of positive acts."

11 Am. and Eng. Enc. Law 2nd Ed. 436.

This "essential element" is lacking in the findings as well as in the pleadings. The truth is McGrath was at all times aggressively claiming the property and litigating his supposed rights to it. Under such circumstances to have warned him would have been an idle act. Besides the time to have set it up was when the contest was had before the town site trustee.

The Court below, however, did not proceed to the logical end, by adjudging the defendant entitled to the ground on the principles of estoppel. Rather the defendant was allowed to exercise a sort of Eminent Domain by compelling in effect a conveyance from plaintiff, upon paying the adjudged value. But if the plaintiff is unable to collect the adjudged value on execution, he might take his land, having paid the costs and expenses of the proceeding as a penalty therefor. For this proceeding we look in vain for any warrant in the law.

THIRD ASSIGNMENT OF ERROR

"The Court erred in not awarding to the plaintiff, Emery Valentine, the sum of $10.00 per month from May 1st, 1901, to the time of trial, as rentals on the property in controversy."

The alleged rental value of the premises sued for aggregates $17.00 per month.

Defendant Hirsch denies this generally for want of information.

Defendant McGrath denies it generally. Neither defendant alleges the rental value or that it had none.

The record contains all the evidence offered on the trial. All the evidence on this issue has been printed. (Rec. 79-86.)

This is the testimony of the plaintiff himself, which is in substance as follows:

Witness had resided in Juneau 23 years; had a great deal of experience in renting property and collecting rents, both for himself and as agent for others; had collected as much as $1000 per month for his own rentals on different tracts; thought he knew the rental value of property in Juneau; knew the property in controversy; knew the rental value of property in that part of town having rented adjoining property; was worth 75 cents to a dollar per foot per month; the piece in Lot 1 Block G was too small to rent, but its occupancy deprived witness of the use of 1½ feet extending the depth of the lot. It

was worth one dollar per month; the premises in the rear of the McGrath building occupied by defendants the collar shaped piece in Lots 2 and 3 Block 3 was worth $7.50 per month; the piece in Lot 3 Block 3 was worth one dollar per month.

On cross-examination he testified as follows:

Q. You think it is worth about a dollar per month to McGrath to extend his corners that much on your ground? As shown on Defendant's Exhibit 1?

A. I don't understand.

Q. This projection shown on Defendant's Exhibit 1, marked "Cornice," that in fact represents the cornice of McGrath's building?

A. This part here of Lot 1?

Q. I refer to the cornice—What do you consider it worth to have the right or permission to extend that cornice over the property as it is shown?

A. It would be just the same as that if I could use that.

Q. Answer my queston—What would you say was the rental value of that?

A. I don't know what the cornice is worth there. I never leased out ground for a cornice.

Q. What in your estimation is that worth?

A. I am not going to estimate because I never rented it out for that.

Q. Then you don't know the rental value of that?

A. I wouldn't put any rental value with the cornice hanging over there, no.

Q. Did you make a statement as to what the rental value was on that part of the southeast corner of Lot 1, Block 3 covered by the McGrath building?

A. Yes, what I had always got for that ground.

Q. How much?

A. About 75c per front foot.

Q. How much is that building there on your ground?

A. I am not a surveyor; you will have to ask the surveyor for that.

Q. What do you base your estimate on when you say it is worth 75c per month?

A. Because I said that was what I had always rented that ground for and that I had rented it at one time—the whole thing was rented out—

Q. For 75c per front foot?

A. Yes, sir.

Q. Have you ever rented anything by the square foot?

A. By the front foot, this and that (indicating).

Q. Do you charge up for the rental value of that corner as much as if the building extended over on your property clear through to the rear?

A. It deprives me of that much.

Q. That is the theory on which you base the estimate of the value?

A. Yes, sir.

Q. You have a stairway right there?

A. Yes, sir.

Q. Right along the wall of the McGrath building?

A. Yes, sir.

Q. And there is a distance of about three and one-half feet between the McGrath building and your building to the west of it?

A. Yes, sir.

Q. Approximately?

A. Yes, sir.

Q. (By the Court). I understand there is an open stairway runs up between the two buildings?

A. On account of his being over on my line my stairway is so very narrow that I can't even the upstairs in the building.

Q. How wide is that stairway?

A. About 2 feet at the top.

Q. Your stairway is built up flush against the McGrath building?

A. Right up against the McGrath building, yes.

Q. How far to the front does your stairway extend along the McGrath building?

A. I don't know.

Q. Does it come out underneath this cornice?

A. I don't know; I never measured that part of it, I don't know how far near the front it extends.

Q. Did you testify that the space shown on Defendant's Exhibit 1 as being encroached upon by the McGrath house in the rear part was worth $15 a month,—what did you say the rental value was of

the ground upon by McGrath's house, that is in the rear of the property?

A. You mean my ground?

Q. Yes, what you claim is yours?

A. $7.50 per month for that; for my part.

Q. You have got a lot of vacant ground here on Lot 3?

A. Yes, sir.

Q. How much s that, $7.50 per month?

A. Because I can't use it on account of that, I couldn't build the sidewalk through from this alley way back into the Central Hotel on account o fthat, I couldn't build anything because it cut me out.

Q. Do you rent any of this property back here (indicating).

A. Yes, sir.

Q. What do you rent.

A. I have a couple of cabins in there.

Q. What do you get for those cabins?

A. $5.00 a month.

Q. Cabin an dall?

A. Yes.

Q. When you figure the rental value of this property do you figure on the renting of the house or is that only the ground rent?

A. I figure the ground rent as worth that much.

Q. The ground alone?

A. Yes, sir.

Q. How long have those buildings been there?

A. Which ones?

Q. The rear building, to begin with?

A. This residence of McGrath?

Q. Yes.

A. I don't know, it was there in 1886.

Q. How long has the front building been where it now is?

A. I couldn't tell, I don't know how long it has been there.

Q. Been there twenty years?

A. I said I couldn' tell; it is there, I am satisfied of that, I see it every day.

Q. It may have ben there twenty years, it may have been built in 1890, for all you know?

A. I don't know—it wasn't built at that time, I am quite sure it was built later than that.

Q. How much later?

A. I can't tell you exactly, I won't say what time it was built there.

Q. State approximately to the Court.

A. You have the time there.

MR. COBB—We object to this as not proper cross-examination.

Objection sustained.

This was all the testimony offered upon this issue.

Defendants were apparently satisfied that the values placed upon it by the plaintiff were none too high, for although "upon trial a large amount of evidence was introduced," (Rec. 100) the defendants

offered none tending to show a less rental value than the estimate placed upon it by the plaintiff.

The Court in its written opinion, said:

"The plaintiff himself testified and attempted to qualify as an expert on the rental value of his property which the defendant had been withholding from him. This was merely opinion upon his part and the Court is not inclined to be bound by his opinion nor follow the rule by which he arrived at the rental value, as there was no other evidence on this question; he will be allowed the nominal amount of $10.00 for the detention of all parcels of property hereby awarded him during the time herein involved." (Rec. 112.)

We respectfully take issue with the expression "attempted to qualify." We think he did qualify. If a resident of a town for 23 years, renting a large amount of property therein both for himself and others, some adjoining, and in the immediate vicinity of the property in controversy is not qualified to testify, as to rental value, it would be difficult to find a person who was. Besides defendants made no objection to the testimony on the ground that the witness had not qualified. They were satisfied with his qualification.

We also take issue with the statement that is was "merely opinion." It was opinion of course; all such testimony is OPINION; but it was "opinion founded on knowledge," and was entitled to the

same weight as positive testimony of a fact; values as a rule can be proved in no other way. Opinion founded upon knowledge of the subject is evidence of the fact of value.

"For evidential purposes," says Judge Wigmore, "Sale-Value is nothing more than the nature or quality of the article as measured by the money which others are willing to lay out in purchasing it. Their offers of money not only indicate the value; they are the value." Wigmore on Ev. Vol. 1, Sec. 463.

That opinion based upon knowledge is the only possible evidence of value, see the able disquisition of the author on the "Opinion Rule" Vol. 3, Sec. 1940 to 43, same work.

The witnesses testimony showed that it was based upon many years experience in renting similar and contiguous property. He gave the prices at which such property rented. If this had not been true defendant could easily have shown it. But no such attempt was made. Was the Court then bound by this evidence?

We think it was; and that it was error to arbitrarily disregard it, and give only nominal damages. It is not a case of conflicting evidence, but a total disregard of the entire evidence.

Nor is it unjust or inequitable for the plaintiff to recover the $1200.00 or more which the evidence entitled him to. For defendant, McGrath, has vin-

dictively litigated this matter and held possession for more than ten years. Defeated in the Land Office, he persists in litigating in the Courts. In the meantime he uses and collects rents from plaintiff's property.

FOURTH ASSIGNMENT OF ERROR

"The Court erred in adjudging that each party pay their own costs, and in not adjudging that plaintiff recover costs of the defendants." (Rec. 91.)

The Court gave as a reason for this ruling:

"Plaintiff by his complaint sought to recover all of Lot 2 Block 3, the greater part of which was held by defendant under Trustees deed and covered with valuable improvements of the defendant." (Rec. 112.)

In this statement the Court fell into a mistake. It is true that in the 1st paragraph of 2nd cause of action (Rec. 4) the statement is inadvertantly made that "plaintiff is the owner and entitled to the possession of Lots 2 and 3," etc. But in the next paragraph the portion actually sued for is carefully described. There was no claim made ata ny time that plaintiff was entitled to any property not embraced in the deeds from the trustee.

Not only so, but the Court in making said ruling disregarded a mandatory provision of the Alaska Code. Sec. 510, Carter's Code Part IV. provides:

"Costs are allowed of course to the plaintiff upon a judgment in the district court in his favor in the following cases:

"First: In an action fort he recovery of the possession of real property" etc.

Sec. 514 leaves the matter of costs discretionary with the Court in equity cases. But there is no discretion given in a law case such as the one at bar.

This was an action to recover the possession of real property. The plaintiff had judgment and was entitled to costs as a matter or right.

Bentley vs. Jones 7 Or. 108.

Crossman vs. Landers 3 Or. 495.

And the rule is the same in the Federal Courts.

Trinidad Asphalt Paving vs Robinson, 52 Fed. 347.

For the errors alleged it is respectfully submitted that the judgment of the Court should be reversed with directions to the lower Court to enter a judgment for all the premises sued for and for damages at the rate of ten dollars per month from May 1st, 1901, the beginning of the six year period next before the commencement of the action, for costs in the lower Court and for costs on this writ of Error.

J. H. COBB,

Attorney for Plaintiff in Error.